



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

The Honorable Edward J. Markey
Chairman
Subcommittee on Telecommunications and the Internet
Energy and Commerce Committee
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Markey:

Thank you for your letter of September 12, 2007 regarding the alleged collection of consumer telephone records by national intelligence entities, including the National Security Agency.

As you noted, I wrote to the Attorney General on March 6, 2007, asking whether, "in light of the state secrets assertions of the United States in civil litigation and the positions taken by the United States in state administrative proceedings, is it the view of the United States that the disclosure that would be entailed by an FCC investigation would pose an unnecessary risk of exceptionally grave damage to the national security of the United States."

As you also noted, the Attorney General had not responded. We again contacted the Department of Justice. The Department of Justice referred my letter to J. M. McConnell, the Director of National Intelligence, and I received a response from him on October 2, 2007, which I have attached herein. The Director of National Intelligence concluded that the United States "have consistently asserted the military and state secrets privilege in litigation concerning allegations of an alleged NSA records program" because disclosures regarding such intelligence activities could cause "exceptionally grave damage to the national security."

Moreover, he concluded that it is the view of the Director of National Intelligence that "[b]ecause an FCC investigation into these allegations would . . . necessarily entail those types of disclosures, it is our view that such an investigation would pose an unnecessary risk of damage to the national security."

Again, I would be happy to discuss these matters with you and welcome any further questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. Martin", is written over a horizontal line.

Kevin J. Martin
Chairman

DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

OCT 02 2007

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Dear Chairman Martin:

On March 6, 2007, you wrote the Attorney General (AG) to request the views of the United States regarding whether an investigation by the Federal Communications Commission (FCC) into allegations that telecommunication carriers have provided the National Security Agency (NSA) with access to customers' telephone records would pose an unnecessary risk to the national security. The AG referred your letter to us and has asked that we respond.

As you note in your letter, the United States generally does not confirm or deny allegations about intelligence activities. That is because such disclosures could reveal information about intelligence sources, methods, and capabilities, and in turn could cause exceptionally grave damage to the national security. The position of Director of National Intelligence (DNI) was created by Congress in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, §§ 1101(a) and 1097, and the law charged the DNI with the responsibility for the protection of intelligence sources and methods. 50 U.S.C. § 403-1(i)(1). To this end, we have consistently asserted the military and state secrets privilege in litigation concerning allegations of an alleged NSA records program.

To date, every court that has considered our privilege assertion has prohibited the disclosure of information concerning the records allegations, including information that would confirm or deny the existence of this alleged activity. Because an FCC investigation into these allegations would, as you indicate, necessarily entail those types of disclosures, it is our view that such an investigation would pose an unnecessary risk of damage to the national security.

In addition, the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence have been comprehensively briefed and provided with extensive documentation with respect to the Terrorist Surveillance Program and other intelligence activities and are exercising oversight in regard to intelligence matters. Congress and the President have established reporting and oversight procedures over decades that balance the congressional oversight responsibility with the need to restrict access to intelligence information. This delicate compromise, embodied in the Intelligence Oversight Act, Title V of the National Security Act of 1947, 50 U.S.C. §§ 413-15, established the procedures for keeping Congress, through its intelligence committees, "fully and currently informed" of intelligence-related

activities. The statutory and constitutional issues that this process reflects were discussed by the Department of Justice in 1988. See 12 U.S. Op. Off. Legal Counsel 171, 174-77.

Under these circumstances, and particularly where, as you note, the FCC has never before investigated intelligence activities of the United States, we support your determination not to initiate an investigation.

We hope this addresses your questions. Thank you for your inquiry. If you have any questions on this matter, please contact the DNI General Counsel, Benjamin Powell, who can be reached on (202) 201-1039.

Sincerely,

A handwritten signature in black ink, appearing to read "J. M. McConnell". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

J. M. McConnell